IN THE

Supreme Court of the United States

October Term, 1953

No. 225

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD, ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL,

Respondents.

CIVIL AERONAUTICS BOARD,

Petitioner,

vs.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES; THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL; AND WESTERN AIR LINES, INC.,

Respondents.

Petition of Western Air Lines, Inc., for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

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Petition of Western Air Lines, Inc., for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Western Air Lines, Inc., respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Summerfield v. Civil Aeronautics Board,* No. 11259, and *Western Air Lines v. Civil Aeronautics Board,* No. 11324.

Opinions Below.

The opinion of the Court of Appeals,[1] which is not yet reported, appears in the record of this proceeding commencing at page 341.[2]

The opinions of the Board which were reviewed by the Court of Appeals are included in the record of this proceeding commencing separately at pages 183, 258 and 333.

Jurisdictional Statement.

The judgment of the Court of Appeals was entered on May 4, 1953 [R. 354]. The jurisdiction of this Court is invoked under Subsection 1254(1) of Title 28, U. S. Code, and Subsection 646(f) of Title 49, U. S. Code.

Summary and Statement of Matter Involved.

This case concerns the fair and reasonable rate of compensation which Western is entitled to receive for transporting mail by aircraft during the period from May 1, 1944, through December 31, 1948. The dispute centers upon the language employed by the Congress in Subsection 406(b) of the Act (49 U. S. Code, Sec. 486).

Subsection 406(a) of the Act is the enabling provision which empowers the Board to fix and determine fair and reasonable rates of compensation for the transportation of mail by aircraft.

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[1]For convenience, the United States Court of Appeals for the District of Columbia Circuit will be referred to as the "Court of Appeals," Western Air Lines, Inc., as "Western," the Civil Aeronautics Board as the "Board," and the Civil Aeronautics Act as the "Act."

[2]For convenience also, the opinion of the Court of Appeals is included in this petition as Appendix A.

Subsection 406(b) sets forth guides to aid the Board in determining the rates.

The legal points necessitating this petition involve the proper construction of (1) the statutory expression "shall take into consideration, among other factors" and (2) the statutory expression "all other revenue of the carrier," appearing in Subsection 406(b).

The pertinent facts in the case are simple. On April 26, 1944, Western filed a petition under Subsection 406(a) of the Act for an increase in the rate of its compensation for carrying the mail [R. 15]. That petition was acted upon by the Board for the first time late in 1948, more than four years after the filing date [R. 54]. During the long interim, Western sold, with Board approval,[3] one of its air routes and certain equipment and properties used in connection with the route at a net book profit of approximately $1,000,000.00 [R. 196]. Western also experienced during the delay period, among other income, net profits of approximately $88,000.00 from the operation of slot-machine concessions in Las Vegas, Nevada, and restaurants and canteens [R. 192].

In 1951 the Board finally awarded to Western the sum of $3,917,361.00 as its total compensation for the transportation of mail in the past period, May 1, 1944, through December 31, 1948 [R. 338]. In arriving at this determination, the Board ruled that Western's net adjusted profit from the sale of the route in 1947 and Western's net profits from the operation of slot machines,

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[3]*United-Western, Acquisition of Air Carrier Property*, 8 C. A. B. 298 (1947).

restaurants and canteens were "other revenue" within the meaning of Subsection 406(b) of the Act [R. 191-200, 261, 266-267]. However, the Board chose to allow Western to retain a part of the profit from the route sale by not offsetting it against Western's mail compensation on the policy ground that voluntary route adjustments would be encouraged [R. 262-265].

The Court of Appeals agreed with the Board's application of the statutory expression "other revenue" but ruled that the Board is without power under the statute to fix individual rates of compensation for the transportation of mail other than on the basis of the particular carrier's specific *need* for compensation, regardless of other public interest factors [R. 349-450].

Statutes Involved.

Section 406 of the Civil Aeronautics Act (52 Stat. 998; 49 U. S. Code, Sec. 486) is set forth in Appendix B to this petition. Other sections of the Act are only indirectly involved and will be set forth at the places where they are mentioned.

Questions Presented.

1. Does the statutory expression "shall take into consideration, among other factors" in Subsection 406(b) bestow on the Board judicial discretion with respect to the weight it shall give to each factor material to the process of rate-making?

2. Does the statutory expression "all other revenue of the air carrier" in Subsection 406(b) of the Act embrace more than revenue derived from the carriage of passengers and property?

3. Does the statutory expression "all other revenue of the air carrier" in Subsection 406(b) include the net profit from the sale of an air route and related equipment?

4. Does the statutory expression "all other revenue of the air carrier" in Subsection 406(b) include an air carrier's net profit from the operation of slot machines, restaurants or canteens?

Specifications of Errors to Be Urged.

The Court of Appeals erred in holding:

1. That the Board followed a concept of its power unauthorized by Section 406 in not offsetting all of Western's profit from the route sale against Western's mail compensation.

2. That Western's net adjusted book profit from the sale of an air route and equipment used in connection with the route constituted "other revenue" within the meaning of Subsection 406(b).

3. That Western's net profit from the operation of slot machines, restaurants and canteens constituted "other revenue" within the meaning of Subsection 406(b).

REASONS FOR GRANTING THE WRIT.

A. It Is Essential to the Proper Regulation of the Air Transportation Industry to Have the Statutory Term "Shall Take Into Consideration" Interpreted by This Court.

This case involves important considerations of public interest. Crucial questions of federal law—the interpretation of a rate-making statute—going to the very core of the regulatory scheme adopted by the Congress for the indispensable air transportation industry are at stake. The vital issues have not been presented to the courts before.

Stripped down to the essentials pertinent to the proper construction of "shall take into consideration, among other factors," Subsection 406(b) reads:

> ". . . In determining the rate in each case, the Board *shall take into consideration, among other factors,* . . . the need of each such air carrier for compensation for the transportation of mail sufficient . . . , together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The Board consistently has taken the position that the term "shall take into consideration," as used in Subsection 406(b), only requires the Board to *consider* the factors enumerated, among others, leaving to the

Board the discretionary right of doing what appears to be proper.[4] This contemplates, of course, that the discretion will be exercised judiciously. Western agrees with the Board's interpretation.

The Postmaster General takes the opposite view. He contends that after the Board has considered all of the other revenue of a carrier (which the Postmaster General thinks is all income) the Board has no discretion but must apply that revenue in reduction of the mail compensation regardless of what public interest considerations might exist for doing otherwise.[5]

Apparently the Court of Appeals adopted the Postmaster General's theory, although the opinion of the lower court, written by Circuit Judge Prettyman is, at best, confusing.[6] And, this confusion is somewhat confounded by the dissenting opinion of Circuit Judge Prettyman in the companion case below, *Summerfield v. Civil Aero-*

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[4]In its opinion and order dated June 26, 1951, the Board stated:

"While we are required by the Act to 'take into consideration' the 'need' of the carrier for mail compensation together with 'all other revenue,' we do not understand the language of section 406(b) as requiring us to reduce the carrier's mail pay 'need' with any part of such 'other revenue.' This is a matter within our discretion." [R. 262.]

[5]In his Petition to Reconsider before the Board dated July 27, 1951, the Postmaster General stated:

"The mail rate section (406(b)) of the Civil Aeronautics Act does not permit the Board discretion to disregard the net revenues derived from the sale of a route certificate when determining the carrier's need for subsidy mail compnsation." [R. 282.]

[6]The Court of Appeals in its opinion below stated:

"Thus we think that, while the so-called 'need' provision of the statute, above quoted, does provide for the payment of sums sufficient to enable the carrier under consideration to maintain and continue development of air transportation, such payments are restricted to the need of each individual carrier to maintain and continue a development program of its own." [R. 349-350.]

nautics Board, No. 11351, in which this irreconcilable statement is found on page 10 of the printed opinion:

> "I am so convinced of the soundness of a complete separation of this foreign rate from the domestic operation, that I would have to agree with the Board that *the elastic statutory phrase 'take into consideration' is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation, even after such earnings are taken into consideration."*[7]

So long as uncertainty attaches to the meaning of "shall take into consideration" in consequence of divergent views entertained by the Board (shared by the industry) and the Postmaster General, coupled with a hazy majority opinion below, contrasting with the conflicting dissenting opinion written by the same Circuit Judge, uncertainty in the administration of a vital part of the Act—the rate-making part—will prevail. And, uncertainty breeds instability, which was the principal evil that the Act was designed to remove.

Although this case concerns only compensation for carrying the mail, the meaning of the term here under discussion has a direct bearing on the Board's control of passenger and property tariffs. Exactly the same phrase is employed in Subsection 1002(e),[8] which sets

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[7]Emphasis in quoted material added throughout unless otherwise noted.

[8]Section 1002(e) (49 U. S. Code, Section 642) reads in part:

> "In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board *shall take into consideration, among other factors—*
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> * * * * * * *
>
> (5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."

forth some of the factors which the Board is required to consider in exercising its powers with respect to passenger and property tariffs.

If the Board lack judicial discretion under Subsection 406(b) relating to mail compensation, as here claimed by the Postmaster General and probably approved by the Court of Appeals, the Board necessarily lacks judicial discretion under Subsection 1002(e). If this be so, disaster could easily engulf the air transportation industry, as nowhere is sound discretion needed more than in the passenger and property tariff-fixing power of the Board—the very jugular vein of air transportation.

If the Board's rate-making power be stripped of discretion, as it would be under the Postmaster General's philosophy and the probable ruling of the Court of Appeals, the Board's ability to respond to its duties under Section 2 of the Act,[9] which relates to the encouragement

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[9]Section 2 (49 U. S. Code, Section 402) reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriage;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences of advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce

and development of air transportation, would be shackled. No provision in the Act, not even the authority to grant, amend and modify route certificates under Section 401, gives the Board as much power to foster the development of air transportation as does its rate-making power, both mail and passenger, provided, but only provided, the Board be cloaked with reasonable judicial discretion. That discretion exists only if the term "shall take into consideration" be construed here as it should be.

Innumerable examples of the grave importance of this issue to the continuing long-range development of the vital air transportation industry could be listed, but none is as pointed as the example found in this case. In exercising what it thought was its discretionary power in offsetting or not offsetting other revenue after having taken that other revenue into consideration, the Board declared:

> "In order to avoid the danger of confining the present air pattern to a rigid mold, and to continue to encourage voluntary action by the carriers, we believe that the incentive of profit which may be derived from the sale of a route . . . should be preserved here." [R. 263.]

The exigent significance of this is underscored by reference to Section 401 of the Act (49 U. S. Code, Sec. 481). Subsection 401(e), commonly referred to as the "grandfather clause," established a method for automatic issuance of certificates covering air routes in existence when

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of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

the Act came into being. Many of those routes had grown up like Topsy, and at least some of them have proved to be ill-advised. In addition, experience has proved that some of the new certificates since granted by the Board under Section 401(d) likewise are ill-advised or could be operated more economically and more effectively by some other carrier. Still the Board has no direct power under the Act to force an abandonment of a route, a transfer of a route from one carrier to another or the merger of two or more carriers. With the discretionary power to allow a selling carrier to retain the nonrecurring profit (assuming this to be revenue required to be heeded under Sub. 406(b)) resulting from the voluntary sale of a route, great impetus will be given to a voluntary and beneficial realignment of the air route pattern. If that profit must be or might be drained off as an offset against the mail compensation, all incentive would be destroyed.

The essence of the opinion of the Court of Appeals is that lacking a showing of need the Board is powerless to fix a rate of compensation for transporting the mail exceeding a naked compensatory rate. But this theory gives no effect to the statutory language "among other factors." On the contrary, the theory fetters the Board by a literal interpretation which is completely at odds with the flexibility intended by the Congress. The expression "among other factors" means simply that the Board within the limits of sound discretion may fix the rate on the basis of factors other than the "need" of the air carrier or on the basis of that "need" as modified by other factors or on the basis of that "need" alone. The Court of Appeals does not challenge or deny the force of the Board's reason for doing what it did in this case but rests its decision

on a construction of the statute which, contrary to the terms of the statute, denies the Board discretionary power and restricts mail payments to the need of the air carrier.

B. It Is of Vital Importance to the Air Transportation Industry, to the Civil Aeronautics Board and to the Postmaster General to Have the Meaning of the Statutory Expression "All Other Revenue of the Air Carrier" Settled.

The Postmaster General has interpreted Subsection 406(b) to mean that all *income* of an air carrier, *regardless of source,* must be applied in reduction of or in the nature of an offset to the carrier's mail compensation.[10]

The Board has interpreted the subsection to mean that all *income* of an air carrier *from activities related to air carrier functions* should be considered in fixing the fair and reasonable rate of compensation for transporting mail.[11]

Western adheres to the position that the "all other revenue" required to be considered by the Board under Subsection 406(b) is limited to revenue derived from the transportation of persons and property.

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[10]On page 21 of the Postmaster General's Brief to the Court of Appeals, this statement is made:

> "Moreover, it is evident that the carrier's actual need can be determined only by a comparison of its actual income *from all sources,* with the amount of income determined by the Board to be sufficient to enable the carrier to perform its transportation functions properly and to receive a fair return on its investment."

[11]In its opinion of November 24, 1950, the Board stated:

> "Where the activity from which the income arose is related to the air carrier functions, such income should be considered as 'other revenue.'" [R. 193.]

It is self-evident that one of the three theories is right. No other interpretation of the subsection, stemming from reason, can be conceived.

Although the language of the Court of Appeals in the opinion under attack is far from clear, it is probable that the Court intended to place its imprimatur on the theory espoused by the Board.

Until the issue has been finalized no air carrier except those enjoying a so-called "compensatory" mail rate, can plan or budget its future. Until these carriers know with certainty what type of income will be and what type of income will not be applied in reduction of their mail compensation, they cannot create plans to expand their activities into broader fields, related or ununrelated, in augmentation of their income or as a shield against a depressed air traffic period or make plans to merge or sell any of their routes to other air carriers.

If the Board's theory—the middle road—be given court approval, the industry still will be in a state of confusion unless the related activities, the income from which would be applied in reduction of the mail compensation, are defined with sufficient accuracy to enable the carriers as well as the Board and the Postmaster General to determine what ventures or activities will be within and what will be without the offsetting area. It is not right and it is contrary to the American conception of fairness to allow a condition to exist under which a carrier does not know and cannot determine whether the profit, if any, from a certain course of conduct or from a certain venture may be retained or will be applied in reduction of its mail compensation. So, if the Board's middle ground philosophy be accorded court

approval, the term "related activities" will have to be defined.

If either the Board's theory or the Postmaster General's theory be approved, it is essential that the industry know, and the Board and the Postmaster General must be told with authority, whether or not a loss from an act or a venture will be underwritten through increased mail compensation. If a profit from a particular venture be subject to offset it would be in violation of all sense of justness to hold that a loss from the same venture would not be subject to recoupment. But the Board thinks otherwise,[12] so the issue must be resolved in court.

C. The Decision of the Court of Appeals Is Not Good Law and Must Be Reversed.

The opinion of the Court of Appeals makes bad law and adds more ambiguity to important provisions of the Act which were and still are in need of clarification. Unless and until reversed by this Court or corrected by an act of Congress, the Board will be bound in its future administration of the Act by the opinion below. In the meantime, the American Flag air transportation industry will suffer to the irreparable damage of the public welfare.

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[12]On page 16 of its brief to the Court of Appeals, the Board stated:

> ". . . Further, even if a particular related air carrier activity is of such nature that losses will not be underwritten, *we still see no reason why profits therefrom should not be offset against the carrier's need for subsidy.*"

1. **The Court of Appeals Misconstrued the Meaning of "Shall Take Into Consideration," Contrary to the Plain Intent of the Congress.**

Subsection 406(b) requires that the Board, in determining the rate in each case, *"shall take into consideration"* certain enumerated rate-making elements, *"among other factors."*

The Postmaster General argued below that the term "shall take into consideration" charged the Board with a mandatory duty rather than granting a discretionary power.[13] The Court of Appeals evidently accepted this argument, although Circuit Judge Prettyman, the author of the opinion in this case, adopted a contrary view in his dissenting opinion in the companion *Chicago & Southern* case, as already has been noted in this petition.

Consistently, the Board has interpreted "shall take into consideration" to mean what simple semantics would have it mean, the discretionary right of doing what good judgment dictates—offsetting or not offsetting other revenue against mail compensation—in accordance with the circumstances that might prevail in each situation under consideration. The Board has always thought that the

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[13]In his Petition to Reconsider before the Board dated July 27, 1951, the Postmaster General stated:

> ". . . in the consideration of whether the development of air transportation requires a subsidy to a particular carrier in addition to compensation for services rendered, as directed by the same section, the Board has *no discretion* under such section but must take into account all other revenue of such carrier obtained from all sources."

only mandate which it was required to meet was *to consider* and then act affirmatively or negatively in response to its judicial discretion. Western agrees.

Had the Congress intended that the Board *had* to offset all other revenue it would have been very simple to use language that could not have been misconstrued, assuming that there be any justification for the obvious misconstruction placed on the term by the Postmaster General. Moreover, had the Congress intended that "shall take into consideration" would require positive action beyond giving consideration it is not likely that the term would be followed by the clause "among other factors" without identifying those other factors.

(a) ESTABLISHED PRINCIPLES OF RATE-MAKING DEMAND THAT THE BOARD HAVE CONSIDERABLE FLEXIBILITY.

This Court has recognized that the process of rate-making is one primarily within the exclusive province of the expert governmental agency having the power to fix rates. In *Board of Trade v. United States,* 314 U. S. 534 (1942), in an opinion delivered by Mr. Justice Frankfurter, this Court declared:

> "The process of rate-making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress had therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." (P. 546.)

In connection with the provisions of Section 15(a)(2) of the Interstate Commerce Act, Mr. Justice Douglas in the case of *New York v. United States,* 331 U. S. 284 (1947), stated:

> "The balancing and weighing of these interests is a delicate task . . . There may be differences of opinion concerning the weight to be given those factors . . . But their significance is for the Commission to determine; and, though we had doubts, we would usurp the administrative function of the Commission if we overruled it and substituted our own appraisal of these factors." (Pp. 347, 349.)

The general principle was reiterated by Mr. Justice Black in *Baltimore & Ohio Railroad Company v. United States,* 345 U. S. 146 (1953), in this fashion:

> "This mere sample of factors that have to be considered in rate cases demonstrates *the absolute necessity for considerable flexibility in rate-making* . . . Commission power to adjust rates to meet public needs is implicit in the congressional plan for a nationally integrated railroad system." (P. 152.)

(b) The Words "Take Into Consideration" Impose No Obligation on the Board to Act.

In *United States v. Interstate Commerce Commission,* 88 F. 2d 780 (1937), certiorari denied, 300 U. S. 684 (1937), the United States Court of Appeals for the District of Columbia construed the words "due consideration," appearing in Section 15(a)(2) of the Interstate Commerce Act, in this manner:

> "The mandate of the act . . . is that the Commission shall give 'due consideration.' *To give due consideration to a particular factor necessarily*

means to give such weight or significance to it as under the circumstances it seems to merit, and this, of course, involves discretion; and, as has been said many times, *judicial discretion.*" (P. 783.)

(c) THE WORDS "AMONG OTHER FACTORS" PERMIT THE BOARD TO CONSIDER AND ACT UPON FACTORS OTHER THAN ARE SET FORTH IN THE STATUTE.

In *United States v. Interstate Commerce Commission,* 88 F. 2d 780 (1937), certiorari denied, 300 U. S. 684 (1937), the United States Court of Appeals for the District of Columbia had this to say:

> "Putting aside all questions of relative importance of the various elements of rate making—because the controlling facts in each case necessarily vary—there can be no doubt that in prescribing reasonable rates the Commission is required to take into consideration, *among other factors,* first, the effect of the rate on the movement of traffic; second, public need of adequate low-cost service; third, the carrier's need of sufficient revenue to enable it to give such service. This, we think, is the clear mandate of the statute. But the weight to be given to these several factors is left to the discretion of the Commission, *as is also the weight to be given the other and unnamed factors which of necessity vary in substance according to the facts.*" (P. 782, first italics in original.)

This broad sweep of discretion to choose the standard or standards upon which to fix rates was reiterated by the United States District Court for the Eastern District of Kentucky in *Chicago B. & Q. R. Co. v. United States,* 60 F. Supp. 580 (1945):

> "Congress has not prescribed the 'other factors' to be considered by the Commission in the exercise

of its power to fix just and reasonable rates. *The determination of the issue of fact in respect to reasonableness as well as the choice of the standard upon which the determination is to be made in each particular case, is left to the informed judgment of the Commission* . . ." (P. 585.)

The Board in this case rested its holding upon the determination that there was a public need for readjustment of the air route pattern through route transfers between air carriers, in order to correct undesirable and uneconomic route structures existing in the air transportation system of this country. Recognizing that it is without power to compel air carriers to transfer routes or to merge, the Board here fixed upon a policy which would preserve the profit incentive to voluntary route adjustments.

The Court of Appeals did not deny, nor could it have denied, the existence of a public need for voluntary route transfers. That is within the exclusive province of the Board to determine. What the Court of Appeals denied was the Board's statutory power to encourage carriers, including Western, to transfer routes, by providing incentives in fixing mail pay.

The implementation of the public interest factors in Section 2 of the Act,[14] in fixing rates, is not a new concept. In *Transcontinental & Western Air v. Civil Aeronautics Board,* 336 U. S. 601 (1949), this Court, in an opinion delivered by Mr. Justice Douglas, stated:

". . . §406(b) authorizes the Board to fix rates for 'classes of air carrier.' It is plain that the uni-

[14]Section 2 is quoted in full in footnote 9, pages 9-10.

> form rate for the class is an important regulatory device. For §2(d) of the Act looks to the sound development of an air transportation system through competition. A uniform rate forces carriers within a given class to compete in securing revenue and in reducing or controlling costs." (Pp. 606-607.)

The right to encourage competition through uniform mail rates, which do not necessarily reflect or correspond to the individual carriers need for compensation, is not different from the right to encourage improvement of route structures and betterment of economic conditions in the industry through the mail rate.

It is fitting that the Board be afforded ample flexibility in its rate-making power to permit it to accomplish the broad purposes of the Act and not alone those purposes specified in Subsection 406(b).

2. The Court of Appeals Failed to Meet the Issue of the Meaning of "All Other Revenue of the Air Carrier" in Subsection 406(b).

Not once did the Court of Appeals discuss the meaning of "revenue." The Court's singular justification for not replying to Western's contentions regarding the meaning of "revenue" was that the rate period had passed and everyone knew Western had these special amounts of income.[15]

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[15]The Court of Appeals in its opinion below stated:

> "The Board knew, and we all know, that Western had in this period this $1,000,000, or thereabouts, in profit.
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> * * * * * * *
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> "It seems to us that under this statute the Board, in fixing a rate of compensation for a past period, may view the facts as it knows the facts to be, that in determining 'need' it is not compelled to ignore that which it knows." [R. 347-348.]

In taking for granted without analysis the meaning of "all other revenue," the Court of Appeals not only ignored Western's arguments but ignored the elementary rules of statutory construction.

Mr. Justice Sutherland in *Porto Rico v. Shell Co.*, 302 U. S. 253 (1937), made this declaration:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering as well, the context, the purposes of the law, and the circumstances under which the words were employed." (P. 258.)

Evidently the Court of Appeals was much impressed with the word "need," together with which "all other revenue of the air carrier" is to be considered by the Board. But the word "need," which is found in the same context in all Federal statutes pertaining to interstate common carriers and their rates,[16] is no more than a shorthand, legislative method of expressing the detailed cost analysis of the results of operations, pervading every rate-making proceeding.

The Court of Appeals admitted that its construction would complicate the Board's duty under the statute and would give rise to unforeseen and inequitable differences between air carriers [R. 348]. The Congress hardly could have intended such a result.

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[16]*E. g.*, 49 U. S. Code, Subsections 15a(2), 316(i), 907(f).

(a) WESTERN'S CONTENTIONS ARE PERSUASIVE AND DEMONSTRATE THAT "ALL OTHER REVENUE" IS LIMITED TO REVENUE OF THE AIR CARRIER FROM THE CARRIAGE OF PASSENGERS AND PROPERTY.

(1) *The Congress Did Not Intend in Section 406 to Depart From the Customary Pattern of Fixing Rates Prospectively, Thus Limiting the Meaning of "Revenue."*

The manifest intent of the Congress in Section 406 is that rates of compensation for the transportation of mail by aircraft will be fixed prospectively. The Board at all times since its creation has acted on this premise. And, it has been only where lack of expedition in a mail rate-making proceeding has occurred, as in this case, that the Board has been confronted with fixing a retroactive rate.

This design of the Act is an important, if not the controlling, consideration in the proper construction of the statute. Income which is susceptible and capable of being forecast by the Board is "revenue" which the Board must take into consideration. Conversely, income which is not susceptible or capable of being forecast by the Board is *not* "revenue" which the Board must take into consideration. A nonrecurring, sporadic capital gain (or loss), such as from the sale of a route, is not susceptible of anticipation and therefore may not be deemed "revenue" (or expense) in the Board's rate-making.

Revenue derived from the transportation of persons and property is the only type of income which can be forecast by the Board with expertness and within range of fairness. During any period projected into the future every certificated air carrier, except the few holding

limited certificates, is certain to derive some revenue from the transportation of passengers and property—the only variance being the volume—and the Board members, being experts in air transportation, are qualified to estimate the revenue from these two sources.

But even though the pharse "all other revenue" be tortured improperly to mean *all other income* from whatever source and of whatever nature, it could only mean the type of income which would lend itself to foresight estimates—rather than hindsight knowledge. This in turn signifies that the term, even as thus twisted, could only embrace reasonably anticipative earnings from normal activities and operations. It could not possibly include a nonrecurring profit, such as the sale of a route certificate or capital assets, for instance, or some type of a "windfall," if a colloquialism will be permitted, such as a substantial book profit from an insured casualty.

It is certain that the Congress would not have burdened the Board members, experts in air transportation but not in other fields of business ventures, with the duty of having to estimate what an air carrier might earn during a future period from running a restaurant, maintaining a dry goods store or operating slot machines and oil wells.

(2) *The Term "Revenue" Has a Restricted Meaning and Was Used in a Restricted Sense in Subsection 406(b).*

The word "revenue" is used only twice in the Act. The second time is in Subsection 1002(e), which reads in part:

> "In exercising and performing its powers and duties with respect to the determination of rates

for the *carriage of persons or property,* the Board shall take into consideration, among other factors—

* * * * * * * *

"(5) The need of each air carrier for *revenue,* sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."

The word "revenue" in Subsection 1002(e)(5) means revenue derived from the rates charged for the carriage of persons and property. The word cannot possibly mean anything more or anything else. It follows that the expression "other revenue" used in Subsection 406(b) cannot refer to any revenue other than the revenue referred to in Subsection 1002(e), because the term "revenue" is not used in any other section of the Act.

It is worthy of note that the other revenue required to be considered by the Board is *"revenue of the air carrier."* An air carrier under Subsection 1(2) of the Act (49 U. S. Code, Sec. 401) is "any citizen of the United States who undertakes . . . to engage in air transporation." Accordingly, in using the words "revenue of the air carrier" the Congress must have intended to mean the revenue which the air carrier would derive from being engaged in air transportation. Air transportation under Subsection 1(10) of the Act includes interstate air transportation, which in turn under Subsection 1(21) means *the carriage by aircraft of persons or property as a common carrier for compensation or the carriage of mail by aircraft.* Had Congress not intended to limit

other revenue, as used in Subsection 406(b), to the revenue referred to in Subsection 1002(e), it would have used language which would have been unequivocal.[17]

In *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479 (1879), this Court at page 495 noted that the language by which the power to fix rates is granted is so often used and is so familiar to the legislative mind that it "is capable of . . . definite and exact statement."

(3) *The Board Has No Control Over the Amount of Income an Air Carrier Derives From Collateral or Incidental Activities.*

Under the Act the Board has control over and power to prescribe the revenue of air carrier *only* with reference to the three principal sources of air carrier income —passengers, property and mail. Section 1002 gives the Board the power to determine and prescribe the rates which an air carrier may charge for transporting passengers and property. Section 406 empowers the Board to determine and fix rates of compensation for transporting the mail. The Board has no power to determine the prices an air carrier shall charge or the amount of income an air carrier shall receive in connection with in-

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[17]Mr. Justice Jackson, dissenting *Transcontinental & Western Air v. Civil Aeronautics Board*, 336 U. S. 600 (1949), gave recognition to the true meaning of the word "revenue," in this fashion:

> "But Congress believed that, in the interest of the national defense and commercial aviation, it had to subsidize pioneering air lines and underwrite *revenues above those to be realized from passenger and cargo carriage.*" (P. 609.)

cidental or collateral activities, such as the operation of restaurants and slot machine concessions.

Since the Board has control over the revenues derived from transporting passengers and property and thus has the power to see to it that those revenues are productive of a reasonable return to the carrier in connection with the air transportation service it is required to maintain. it is altogether fitting that the Board should have the right to consider those revenues in fixing a fair and reasonable rate of compensation for transporting the mail. Since the Board does not have the power to determine the prices that an air carrier shall charge or receive in connection with its incidental or collateral activities, it is only proper that the income (or loss) from those sources should not be considered by the Board in arriving at a fair and reasonable rate of compensation for the transportation of mail.

Conclusion.

Three reasons, each involving considerations of compelling public interest, exist for issuing a writ of certiorari in this case:

1. The fair and legal administration of Section 406 of the Act—one of the paramount sections—requires a full and final interpretation by this Court;

2. The unresolved divergent constructions placed upon an essential part of Section 406 by the two governmental agencies most concerned with its administration will create continuous confusion and dissention in a utility of critical importance to the country; and

3. Unless corrected, the error of the Court of Appeals in upholding the Postmaster General's erroneous interpretation of "shall take into consideration" in this and its companion case, *Summerfield v. Civil Aeronautics Board,* and in approving the Board's fallacious interpretation of "all other revenue" will set in motion a chain of bad decisions by the Board, thereby hampering the continued development of air transportation.

Los Angeles, California, July 29, 1953.

Respectfully submitted,

HUGH W. DARLING,
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Attorneys for Petitioner Western Air Lines, Inc.

D. P. RENDA,
Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 11259

Arthur E. Summerfield, Postmaster General of the United States, and The United States of America, on behalf of the Postmaster General, Petitioners, v. Civil Aeronautics Board, Respondent.

No. 11324

Western Air Lines, Inc., Petitioner, v. Civil Aeronautics Board, Respondent.

On Petitions for Review of Orders of the Civil Areonautics Board. Decided May 4, 1953.

Mr. Daniel M. Friedman, Special Assistant to the Attorney General, Department of Justice, *pro hac vice,* by special leave of Court, with whom *Mr. Newell A. Clapp,* Acting Assistant Attorney General, Department of Justice, was on the brief, for petitioners in No. 11259. *Mr. Charles H. Weston, Chief,* Appellate Section of the Antitrust Division, Department of Justice, and *Mr. William E. Kirk, Jr.,* Assistant United States Attorney at the time of argument, also entered appearances in behalf of the petitioners in No. 11259.

Mr. Hugh W. Darling for petitioner in No. 11324. *Mr. L. Welch Pogue* also entered an appearance in behalf of petitioner in No. 11324.

Mr. O. D. Ozment, Attorney, Civil Aeronautics Board, with whom *Mr. Emory T. Nunneley, Jr.,* General Counsel,

Civil Aeronautics Board, was on the brief, for respondent. *Mr. John H. Wanner,* Associate General Counsel, Civil Aeronautics Board, also entered an appearance in behalf of respondent.

Before PRETTYMAN, PROCTOR and BAZELON, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These cases concern orders of the Civil Aeronautics Board which fixed the compensation of Western Air Lines for the transportation of mail from May, 1944, through December, 1948. The dispute revolves about Section 406 of the Civil Aeronautics Act.[1] The proper treatment of several matters is involved.

Principally the petitions concern the treatment of the profit derived by Western from the sale to United Air Lines of a certificate for an air route and certain equipment used in connection therewith. Prior to September 15, 1947, Western owned a certificate for Route 68—between Los Angeles and Denver. After a hearing the Civil Aeronautics Board approved the sale of the route and the equipment to United Air Lines[2] for a total price of $3,750,000. Of this $722,000[3] was then computed as profit on the sale of tangibles and $447,000 as profit on the sale of intangibles. The Board decided that the transfer of the route at the amount to be paid by United was in the public interest, because the profit on the transaction would provide the necessary incentive for Western

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[1]52 Stat. 998 (1938), as amended, 49 U. S. C. A. §486.

[2]United-Western, Acquisition Air Carrier Property, 8 C. A. B. 298 (1947).

[3]Later recomputed to be $648,102.

to make a sale and the purchasing carrier could operate the property to greater advantage to the public. The Board acted upon the premise that it has no power to force a carrier against its will to transfer property to another carrier; its only power to influence such transfers is the power of inducement. It decided that a profit on a sale would be such an inducement. Hence it approved the sale.

When the Board came, in the present proceeding, to the determination of compensation to Western for the transportation of mail, a problem arose as to the treatment of this profit in the computations.

The statute, in pertinent part, provides:

> "(a) The Board is empowered and directed * * * to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft * * *.
>
> "(b) * * * In determining the rate in each case, the Board shall take into consideration, among other factors, * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."[4]

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[4] *Supra*, note 1.

The statutory language which is critical in the present dispute is "the need of each such air carrier for compensation * * * sufficient * * *, together with all other revenue of the air carrier, * * * to maintain and continue the development of air transportation."[5]

Perhaps the problem is made clearer by use of a little simple arithmetic. If a carrier has $1,000,000 in revenue and $1,300,000 in expenses, obviously it needs $300,000 to break even; the "break even need." Then it needs a return on its investment and some working capital; let us say $200,000 for those needs. The statute says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation. Let us suppose that for the latter purpose the carrier needs another $100,000. In sum the carrier needs $600,000. Now, obviously, in this calculation the greater the amount of the carrier's existing revenues, the less the amount it needs by way of additional mail pay; and the less the revenues the greater the additional mail pay. So the inclusion of a given amount in revenues lessens the mail pay by that amount, and the omission of an amount from revenues increases the needed mail pay. Such is our present problem.

The Board at first decided that the entire profit on the sale of Route 68 was "other revenue," and it included this amount as revenue in calculating the amount of mail pay needed by Western. The effect was to reduce the mail pay by that amount. Upon reconsideration the

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[5]Of course the statute provides, in effect, for a minimum which is actual compensation for service performed. That payment is not in dispute here.

Board changed its position. It included the profit from the sale of tangibles as "other revenue" in its calculation, but it did not include the profit from the sale of intangibles. The effect was to reduce mail pay by the amount of the profit on the tangibles, but the profit on the intangibles was left out of the calculation entirely.

The Postmaster General is a party in interest by reason of the duties in respect to mail pay imposed upon him by the statute.[6] He says the Board was in error in its treatment of the profit on the intangibles. Western says the Board was in error in its treatment of the profit on the tangibles. The Postmaster General would include in revenues the entire profit on the sale of the route and the equipment. Western would exclude the entire profit from revenues in the calculation.

We turn first to the problem of the profit on the tangibles. This was a gain derived from the sale of capital assets. As such it was "income" within the meaning which that term has had ever since *Doyle v. Mitchell Bros. Co.*[7] But our problem is whether it was "revenue" within the meaning of this rate-making statute. We think the answer should be sought chiefly in the substantive meanings of the statutory provisions rather than in the semantics of the phrases.

The difficulty of the problem arises because this proceeding is to determine a rate of compensation for a past period. Ordinarily, of course, rates are fixed for the future. We think it clear that the profit from an isolated past sale of capital assets could not be included in a

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[6]Sec. 406 of the Act, 52 Stat. 998 (1938), 49 U. S. C. A. §486.

[7]247 U. S. 179, 62 L. Ed. 1054, 38 S. Ct. 467 (1918).

calculation of compensation to be paid in future years for carriage of the mail. It would not be anticipated revenue in the future period. With that proposition the Board agrees. In fixing the rate for the future it has considered as revenue only reasonably anticipated items.

Western bases its foremost argument upon the foregoing as a premise. It insists that the present proceeding is a rate-making proceeding and nothing else; that a rate-making proceeding must be, in contemplation of law, rate-making for the future—a prospective rate-making, since, it says, rate-making is inherently a prospective concept. The Board itself has several times so held. And, of course, that is a generally accepted view as to utility rates. There is great power in that argument.

But we are impressed by the practical aspects of the situation. In this instance the Board was in fact looking at a period which had passed. The actual facts as to revenues and expenses for that period were known. The actual need, or lack of it, of the carrier in that period was known. In saying that the Board was looking at a past period we are not departing from the rule in the *T. W. A.* case.[8] The period began when the petition for the rate-making was filed, *i.e.*, May, 1944; as of that date the rate-making was prospective. When the Board got around to making its findings and decision the period 1944-1948 was past. It is to the latter actually that we refer.

At this point the two different considerations embodied in this statute must be noted. The statute provides for actual compensation for the service performed in carrying

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[8]T. W. A. v. Civil Aeronnautics Board, 336 U. S. 601, 93 L. Ed. 911, 69 S. Ct. 756 (1949).

the mail—a so-called service rate. This is the ordinary purpose of a utility rate. It involves reimbursement for expenses incurred in performing the service, return on the investment used in the service, and a reasonable profit on the transaction. This much is due whether the service is past or future. In the case at bar no dispute arises in respect to that phase of the matter.

But this statute adds to these ordinary features of a utility rate another consideration. It provides that the pay for carrying the mail shall be sufficient to meet the carrier's need. It describes that need as being for funds to perform the service of carrying the mail and also to maintain and develop air transportation. The problem under this provision of the statute is: How much does the carrier need? The answer depends upon (1) the gross, or total, need in dollars and (2) how much the carrier will have outside of mail pay.

In the ordinary case, where the rates are for the future, the revenue of the carrier must be anticipated. But where the pay is being computed for a past period may the Board accept as a fact that which it knows to be a fact, or must it ignore the known fact and compute the rate as though it were looking at the unknown future as of the date of the beginning of the period? The Board knew, and we all know, that Western had in this period this $1,000,000, or thereabouts, in profit. That profit was derived from the disposition of assets acquired for or created by its operations under its certificate.

Let us suppose, as was the case in the basic findings here, that Western's total non-mail revenue was about $33,000,000 and its total operating expenses were about $36,000,000. How much does it need? How much does it

need if, in addition to the $33,000,000, it also has a special profit of $1,000,000? Does it actually need $3,000,000, or does it actually need only $2,000,000?

The gist of the answer lies in the fact that we are to determine "need." We are not determining merely adequate compensation for services rendered, in the ordinary public utility sense. To be sure, the payment is cast by the statute as a rate, and the process as a rate-making. But even so the Supreme Court held in the *West Ohio Gas* case[9] that, when the period under consideration has passed, fair and reasonable rates should be ascertained from what is known and not from a *nunc pro tunc* estimate. In the case now before us the disputed basic consideration is a need, a need beyond the requirements of fair compensation for a service performed, not dependent upon the amount or the nature of the service rendered. *A fortiori,* from the *West Ohio Gas* case, the amount of need for a period which has passed must be ascertained in the light of known facts.

It seems to us that under this statute the Board, in fixing a rate of compensation for a past period, may view the facts as it knows the facts to be, that in determining "need" it is not compelled to ignore that which it knows. We conclude that in ascertaining Western's need for the period May, 1944, to December, 1948, the Board was permitted to take into consideration the fact that Western had this profit in that period from the sale of these assets.

We fully realize that our view of the statute will give rise to difficulties in respect to losses and also in respect

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[9]West Ohio Gas Co. v. Comm'n (No. 2), 294 U. S. 79, 82, 79 L. Ed. 773, 55 S. Ct. 324 (1935).

to unusual or unanticipated earnings. The rule may make too much depend, from the standpoint of the carrier, upon tactical decisions whether and when to file petitions for rate-making. But we think such possibilities cannot negative statutory terms. Moreover other difficulties arise from any other rule. And, again, it seems to us that much of the anticipated difficulty can be prevented by expedition on the part of the Board, so that what is prospective in legal theory will be prospective in actual fact. If expeditious disposition of petitions does not meet the troubles arising from the rule, it is always possible that Congress may change the statutory provision. Our part is done when we conclude what Congress meant by the provision now before us.

We turn next to the treatment of the profit on the intangibles. The Board did not find, and it does not claim now, that Western itself needs the additional amount of mail pay which is shown when the profit on the sale of the intangibles in this transaction is omitted from "other revenue" in the computation. The claim of the Board is that it can allow Western to exclude this sum from stated revenues in order to encourage other carriers (not Western) to follow a given course of action. The Board said, in its opinion in the present case, that it wished to emphasize that the "decision not to include the net profit from the sale of intangibles was reached solely because we are thus seeking to encourage improvement of the air route pattern through voluntary route transfers by other air carriers. In other words, we have decided not to offset this profit against the carrier's need because we are seeking in this way to spur the development of a self-sufficient air transport industry."

We recognize the force of the Board's description of the desirability of encouraging carriers to transfer routes and other property. But we cannot find in the statute any power conferred upon the Board to do so in fixing mail pay. We do not find any mail pay provision which is authority for the Board to provide incentives to the industry generally for the development of air transportation through the voluntary actions of carriers.

In the first place, the language of the statute sharply limits developmental allowances to the needs of the carrier under consideration. (1) The statute speaks of the "need" of the carrier. It does not speak of the desirability of allowances. It does not speak of purely bonus awards. (2) It speaks of "each" air carrier and compensation sufficient to enable "such air carrier" to develop. The statute is not cast in terms applicable to the general field of air transportation but to the situation in which each air carrier finds itself. (3) The statute provides that the mail pay shall be sufficient "to enable" the air carrier to maintain and continue development. This is a sharply limited expression. It does not extend to bonus awards which might be encouraging to the industry generally. Thus we think that, while the so-called "need" provision of the statute, above quoted, does provide for the payments of sums sufficient to enable the carrier under consideration to maintain and continue development of air transportation, such payments are restricted to the need of each individual carrier to maintain and continue a development program of its own.

In the second place, the Supreme Court held in the *T. W. A.* case, *supra*, that the mail pay provisions of this statute describe a rate-making authority, and the Court

said that the statutory language does not suggest that Congress intended to break with the traditions of public utility rate-making. Allowances designed as developmental incentives for the utility whose rates are being determined are quite common in public utility rate-making. But the award of bonus subsidies for the purpose of encouraging an industry generally to follow courses deemed desirable by the regulatory authority is a vast departure from rate-making. Mr. Justice Jackson made the distinction indisputably clear in his dissent in the *T. W. A.* case. He was of opinion that in these provisions of the statute Congress intended to subsidize the carriers and to underwrite their revenues. We think that the decision in the *T. W. A.* case as to the nature of the mail pay provisions leaves no room for bonus subsidies not connected with the particular carrier's own need. So the statute does not support the theory upon which the Board desires to go in this proceeding in respect to the profit from the intangibles.

We must conclude, therefore, on this point that the Board was in error in the theory upon which it excluded from the calculation the profit from the sales of the intangibles.

The parties dispute the Board's treatment of federal income tax liabilities in its computation of the mail pay. The tax liability upon an estimated basis as of the beginning of the period was some $600,000. It developed that, due to carry-back losses and other provisions of the federal tax statutes. Western had little or no tax liability for this period. In its final orders on mail pay the Board acted upon the latter basis of fact. We think it was

correct in doing so. The preceding discussion is sufficient as a statement of our reasons.

Western also asserts that the Board erred in including as "other revenue" in the calculation of mail pay the profits derived from the operation of restaurants and slot machine concessions at its airports. We think the Board was clearly correct in this treatment. When the statute says "all other revenue" it must mean to include revenue derived from activities incidental to the operation of the airline. Whether it would also include revenue from activities unconnected with airplane operation is a question not before us and upon which we intimate no opinion.

Western asserts as reversible error the decision of the Board to fix in this proceeding the mail pay beginning in May, 1944. Western says that the consideration should have begun as of January 1, 1946. But the Board has power under the statute (Sec. 406(a)) to "make such rates effective from such date as it shall determine to be proper," and the Supreme Court held in the *T. W. A.* case that that clause empowered the Board to go back as far as the date of the filing of the petition. That is what the Board did in this case. Western filed its petition for redetermination of mail pay on May 1, 1944.

We add one further comment in regard to the expressions "offset," "deduction" and "recapture" used by the parties in describing the treatment of the profit from the sale of the assets if it be included in revenue. The phraseology would not be important if it did not embody

erroneous ideas. The need which this statute contemplates is a net figure; the extra amount which appears necessary over and above that which the carrier has. The process provided by the statute is for an affirmative ascertainment of that need. The need is not a gross figure from which offsets or deductions are made. Thus the passenger revenue etc., is not "offset" against or "deducted" from the need of the carrier. None of the earned revenue is recaptured. The bare, uncomplicated situation is that when the carrier has substantial revenues from non-mail sources the margin of its need for mail pay is less. In practical dollar effect, and perhaps in accounting entries, the treatment may be set up as a gross need with offsetting items, and so it takes on an appearance of recapture. But the legal contemplation of the statute is not that, and the use of the quoted terms leads to erroneous reasoning.

The necessity for reconsiderations, redeterminations and recalculations in the light of this opinion causes us to remand the matter to the Board. The remand is to enable the Board to determine, in the light of this opinion and pursuant to the statutory terms, the amount of compensation to be paid Western for the transportation of mail during the period here involved—May, 1944, to December, 1948.

Affirmed in part, reversed in part, and remanded.

BAZELON, *Circuit Judge,* concurring: I agree with the court's opinion and its comment that the rule we adopt in construing the statute "will give rise to difficulties in respect to losses and also in respect to unusual or unanticipated earnings"[1] but I am unable to agree that "much of the anticipated difficulty can be prevented by expedition on the part of the Board."[2] I think these difficulties or "other difficulties [which might] arise from any other rule"[3] are inherent in the statute and will persist so long as there is no express differentiation therein between compensation for mail service and need payments to subsidize the development of air transportation. This is so because the absence of such a distinction, says the Supreme Court, requires the application of traditional principles of rate making.[4] The effect of this is to make applicable to subsidy as well as compensation payments the familiar principle that "past excessive earnings belong to the [carrier] just as past losses must be borne by it."[5] Therein lies the mischief. For that principle derives its validity from the premise that rates are calculated to allow for some financial risk on the part of the public utility.[6] But since the very purpose of need or subsidy payments is to remove any vestige of risk, that principle has no place in fixing such non-rate payments.

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[1]Majority opinion, p. 8.

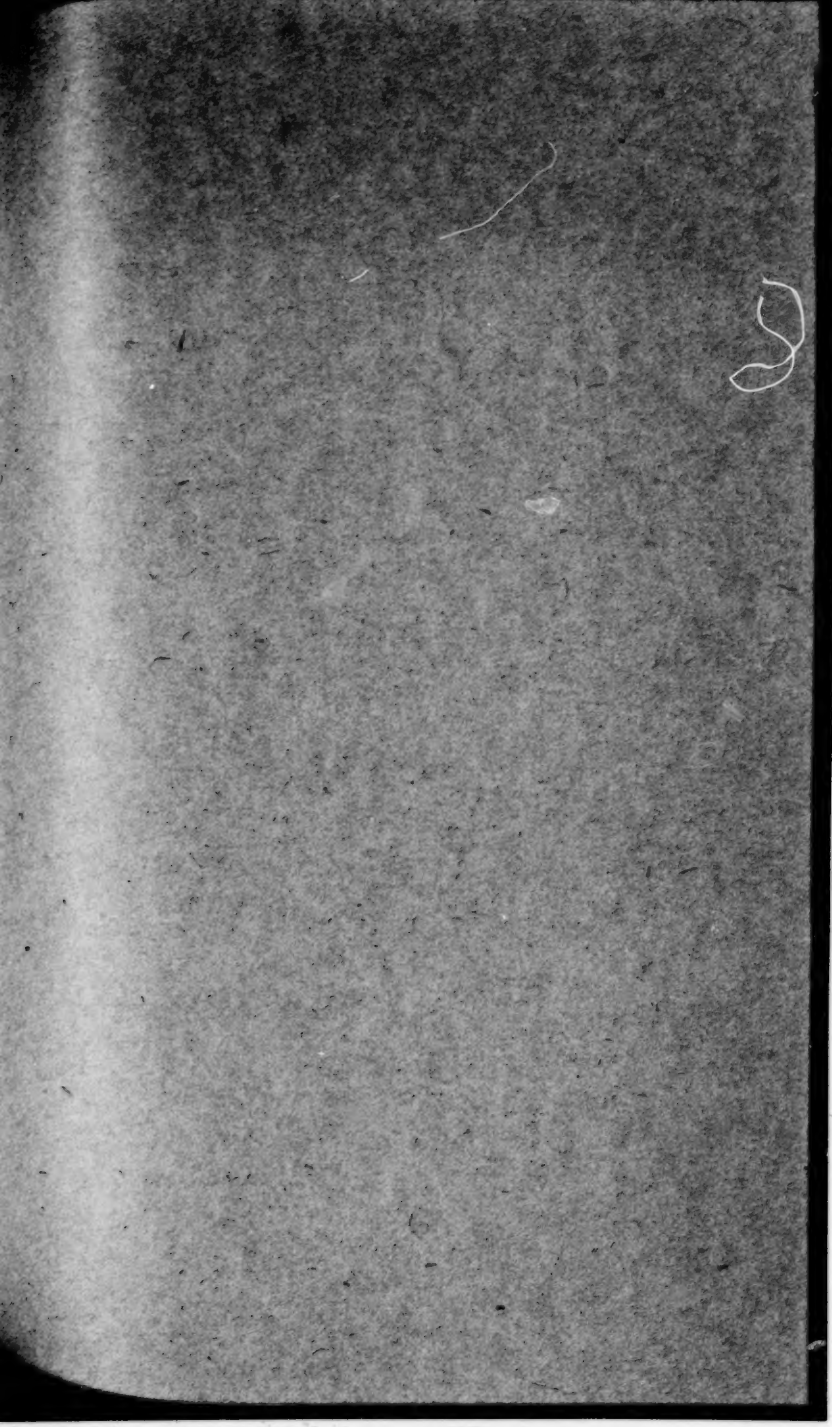
[2]*Ibid.*

[3]*Ibid.*

[4]Transcontinental & Western Air v. Civil Aeronautics Board, 336 U. S. 601, 605 (1949).

[5]Washington Gas Light Co. v. Baker, 88 U. S. App. D. C. 115, 125, 188 F. 2d 11, 21 (1950), *cert. denied,* 340 U. S. 952 (1951). And see my concurrence this day in Summerfield, *et al.* v. Civil Aeronautics Board, No. 11351.

[6]*Ibid.,* and cases cited in note 15 therein.



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APPENDIX B.

Rates for Transportation of Mail

Board to Fix Rates

Sec. 406 [52 Stat. 998, 49 U. S. C. 486] (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers on classes

of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation[7] of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Statement of Postmaster General and Carrier

(c) Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of

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[7]So in original.

the air carrier and such other information in his possession as may be deemed by the Board to be material to the inquiry.

Weighing of Mail

(d) The Postmaster General may weigh the mail transported by aircraft and make such computations for statistical and administrative purposes as may be required in the interest of the mail service. The Postmaster General is authorized to employ such clerical and other assistance as may be required in connection with proceedings under this Act. If the Board shall determine that it is necessary or advisable, in order to carry out the provisions of this Act, to have additional and more frequent weighing of the mails, the Postmaster General, upon request of the Board, shall provide therefor in like manner, but such weighing need not be for continuous periods of more than thirty days.

Availability of Appropriations

(e) Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered into under the Air Mail Act of 1934, as amended, and the unexpended balances of all appropriations available for the transportation of mail by aircraft in Alaska, shall be available, in addition to the purposes stated in such appropriations, for the payment of compensation by the Postmaster General, as provided in this Act for the

transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the continental United States or between points in Hawaii or in Alaska or between points in the continental United States and points in Canada within one hundred and fifty miles of the international boundary line. Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered into under the Act of March 8, 1928, as amended, shall be available, in addition to the purposes stated in such appropriations, for payment to be made by the Postmaster General, as provided by this Act, in respect of the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the United States and points outside thereof, or between points in the continental United States and Territories or possessions of the United States, or between Territories or possessions of the United States.

Payments to Foreign Air Carriers

(f) If any case where air transportation is performed between the United States and any foreign country, both by aircraft owned or operated by one or more air carriers holding a certificate under this title and by aircraft owned or operated by one or more foreign air carriers, the Postmaster General shall not pay to or for the account of any such foreign air carrier a rate of compensation for transporting mail by aircraft between the

United States and such foreign county, which, in his opinion, will result (over such reasonable period as the Postmaster General may determine, taking account of exchange fluctuations and other factors) in such foreign air carrier receiving a higher rate of compensation for transporting such mail than such foreign country pays to air carriers for transporting its mail by aircraft between such foreign country and the United States, or receiving a higher rate of compensation for transporting such mail than a rate determined by the Postmaster General to be comparable to the rate such foreign country pays to air carriers for transporting its mail by aircraft between such foreign country and an intermediate country on the route of such air carrier between such foreign country and the United States.